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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

WILLIAM R. LEWIS et al., Plaintiffs and Appellants, v. COUNTY OF MONTEREY, Defendant and Respondent.	H044252 (Monterey County Super. Ct. No. 15CV000782)

This case concerns a $25,000 fine imposed by defendant County of Monterey against plaintiffs William R. Lewis and Duncan B. Lewis for using a large house next door to their primary residence as a short-term rental property and wedding venue without obtaining permits for those uses. The county sent notices over multiple years informing plaintiffs their short-term rental and wedding venue uses were not allowed without a permit. The county eventually imposed the fine at issue here when plaintiffs continued the uses without applying for a permit. Plaintiffs seek to use their appeal of that fine as a vehicle to challenge what they allege is a pattern of discrimination against coastal landowners in favor of inland landowners for whom short-term rentals are authorized with a permit. As we will explain, plaintiffs' failure to apply for or obtain a permit to use their property for short-term rentals and weddings provided an adequate basis for the fine they challenge. We will therefore affirm the judgment without reaching the broader land use questions raised by plaintiffs' briefing.

I. ADMINISTRATIVE AND TRIAL COURT PROCEEDINGS

Plaintiffs purchased the subject property in the late 1990's. It is zoned Low Density Residential, is located within the coastal zone, and is next door to plaintiffs' residence. The one-acre property has a house and parking for 40 cars. In his testimony at the administrative hearing about the fine at issue here, plaintiff William R. Lewis confirmed that plaintiffs rented out the property as a short-term rental. The minimum rental term was seven nights, and the rental price ranged from $6,850 to $10,850 per week depending on the season. He confirmed that they allowed renters to use the property to hold weddings although he stated they did not charge any additional fee for weddings over the base rental rate. And he confirmed that plaintiffs never applied for any permit from the county for the short-term rental or wedding uses.

A. Relevant County Code Provisions

Title 20 of the Monterey County Code contains the zoning regulations applicable in the coastal zone.[1] Section 20.02.040 explains that the "coastal zoning districts list the uses which are allowed or may be allowed subject to discretionary permit processes" in each zone, and that any "[o]ther uses are prohibited." Title 20.14 regulates development within the Low Density Residential zone. A small number of uses are exempt entirely from any permit requirement, including the "maintenance, alteration, or addition to existing single-family dwellings." All other allowable uses require a permit of some kind. Section 20.14.040 lists principal uses allowed after obtaining a coastal administrative permit, including construction of the "first single family dwelling per legal lot of record." Section 20.14.050 lists conditional uses allowed after obtaining a coastal development permit, including as relevant here: bed and breakfast facilities (which require a host to live at the rental property); "[a]ssemblages of people, such as carnivals, festivals, races and circuses, not exceeding 10 days and not involving construction of

[1] We previously granted the county's motion requesting judicial notice of relevant county code provisions. (Evid. Code, §§ 452, subd. (b), 459.)

permanent facilities"; and "[o]ther residential uses of a similar character, density and intensity to those uses listed in this Section determined by the Planning Commission to be consistent and compatible with the intent of this Chapter and the applicable land use plan." The decision to grant or deny a coastal development permit is appealable to the county's Board of Supervisors. It is undisputed that short-term rentals are not specifically mentioned in Title 20. The county code provides that "[a]ny condition caused or permitted to exist in violation of any of the provisions of this Code shall be deemed a public nuisance and may be summarily abated."

B. Short-term Rental Regulation in the County

The county's Board of Supervisors passed an ordinance in 1997 to create a permit process regulating short-term rentals throughout the county. The stated intent of the ordinance was to "legalize existing" short-term rentals by establishing a permit program to authorize that category of land use while also regulating short-term rentals to avoid adverse impacts to surrounding uses. The ordinance established separate but functionally identical permit programs for the inland and coastal zones of the county, which would allow owners to apply for and receive administrative permits to use properties as short-term rentals. The code provisions applicable to the inland areas took effect, and remain in effect. But the short-term rental zoning amendments applicable to the coastal zone did not immediately go into effect because they first had to be approved by the Coastal Commission for consistency with the county's local coastal program. (Pub. Res. Code, §§ 30513, 30514; *Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 928 ["When certifying the local implementation plan, including amendments, the commission is required to consult the land use plan . . . to ensure conformity between the land use and the local implementation plans."].)

A Coastal Commission district manager sent the county a letter about the short-term rental ordinance in late 1997. The manager indicated that while short term rentals could be an acceptable land use within the coastal zone, the ordinance as drafted

was inconsistent with other provisions of the county's local coastal program. The manager suggested amendments the county could adopt to authorize short-term rentals while maintaining consistency with its local coastal program. The county never finalized a short-term rental ordinance applicable in the coastal zone.

As relevant to certain arguments raised by plaintiffs on appeal, a Coastal Commission district manager sent the county a letter in 2016 because Commission staff had been informed that the county was "grappling" with regulating short-term rentals. The manager noted that the Coastal Act places a higher priority on visitor-serving uses than it does on private residential uses (an argument in favor of short-term rentals), but also recognized that allowing short-term rentals must be balanced against other Coastal Act priorities including protecting sensitive coastal resources and protecting certain coastal residential communities near popular visitor destination points. The manager opined that short-term rentals "are allowable in Monterey County's coastal zone under the [local coastal program]," but acknowledged that the competing priorities of the Coastal Act require a "nuanced approach to their regulation." The manager encouraged the county to work with the Commission on a local coastal program amendment that "meets Monterey County's specific needs and coastal contexts consistent with the Coastal Act."

C. Administrative Complaints

The county received a complaint about plaintiffs using their property for short-term rentals in 2011, and the county sent plaintiffs a notice. The county received another complaint a month later about plaintiffs having "[i]llegal vacation rentals" and "hold[ing] major events with hundreds of people year round." The county imposed a $100 administrative citation against plaintiffs in early 2012 for using the property as a short-term vacation rental without a permit. A complaint received in spring 2013 stated plaintiffs used the property as a short-term rental with "lots of noise all night."

The compliance order that led to the fine plaintiffs challenge here was sent to plaintiffs in mid-2015 (i.e., almost four years after the county received its first complaint about the property). The order identified two violations: "Rental of a property for less than 30 days in the Low Density Residential (LDR) zoning district without proper permit/approval," and "Rental of a property for events (e.g., weddings) in the Low Density Residential (LDR) zoning district without proper permit/approval."

The county sent plaintiffs a draft stipulated agreement in July 2015 that would have resolved the matter. Under the agreement plaintiffs would pay the county's administrative costs and would also "agree to apply for a Coastal Development Permit for a Bed/Breakfast establishment and a Coastal Development Permit for Assemblage of People for Events." Plaintiffs rejected the proposed agreement. Lewis later explained at the administrative hearing that he rejected the agreement because there were "a lot of hoops to have to jump through that were going to create all kinds of obstacles."

While the compliance order was pending, the county's planning director submitted an interpretation request to county staff on the following question: "Which Monterey County Codes apply to the short-term rental (30 days or less) for overnight accommodations?" Staff responded that "[r]ental for 30 days or less (non-bed and breakfast) is not permitted in the Coastal Zone." Plaintiffs apparently questioned that interpretation via e-mail to the planning director. The planning director responded via letter in August 2015, informing plaintiffs that the interpretation request was not a formal interpretation. The letter states: "If you desire a formal administrative interpretation . . . you are advised that Chapter 20.88 of the County Code establishes the procedure for the public to request an interpretation by the Director of Planning" and that the same chapter "provides for appeal of the Director of Planning's interpretation to the Planning Commission." Plaintiffs never requested a formal interpretation.

D. Administrative Hearing and Appeal to the Superior Court

The parties attended an administrative hearing in October 2015 before a third party neutral to determine whether to uphold the compliance order, as provided for by the county code. At the administrative hearing, the planning director testified that when he arrived in the county in 1999 he was "taught that short-term rentals were not allowed in the coastal zone as part of my training," and he stated he had "never observed a deviation from that position." Lewis testified consistent with the summary we already provided. The hearing officer issued a written decision finding that the unpermitted rental of the property for short-term rentals and weddings violated the county code and therefore constituted a public nuisance. The decision ordered plaintiffs to pay administrative costs and a $25,000 administrative penalty. That penalty would increase to $100,000 if plaintiffs failed to abate the nuisance within 30 days.

Plaintiffs filed a complaint in the trial court challenging the hearing officer's decision, alleging a cause of action under Government Code section 53069.4 to appeal the decision and a cause of action seeking declaratory relief. After a hearing where the court heard argument from the parties without taking any new evidence, the court denied plaintiffs' claims. The trial court concluded in a statement of decision that the "ordinances in question are valid, the administrative hearing officer's decision that they were violated must be upheld, and [plaintiffs] are not allowed to engage in short term rentals or commercial use of the property for weddings without a permit."

II. DISCUSSION

Plaintiffs' appellate arguments can be divided into two categories. The first involves a single, narrow issue: did the trial court err when it determined that the county properly imposed the $25,000 administrative penalty in response to plaintiffs' use of their property for short-term rentals and weddings without a permit. The second pertains to several arguments that are only tangentially related to administrative penalty at issue here, including an argument that coastal landowners are denied equal protection of the

law compared to inland landowners as well as a challenge to the county's purported ban on short-term rentals in the coastal zone.

A. Standard of Review

Plaintiffs sued under Government Code section 53069.4, which provides: "within 20 days after service of the final administrative order or decision of the local agency . . . a person contesting that final administrative order or decision may seek review by filing an appeal to be heard by the superior court, where the same shall be heard de novo, except that the contents of the local agency's file in the case shall be received in evidence." (Gov. Code, § 53069.4, subd. (b)(1).) "Government Code section 53069.4, subdivision (b)(1), offers alternative procedures for challenging a final administrative decision, either by a petition for writ of mandate or by a de novo appeal to the superior court." (*Martin v. Riverside County Dept. of Code Enforcement* (2008) 166 Cal.App.4th 1406, 1409.) As the only relevant fact—that plaintiffs never applied for or obtained a permit—is undisputed, we review de novo the application of law to that undisputed fact. (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1384.)

B. The Administrative Penalty Was Properly Imposed

1. Short-term Rental and Wedding Uses Require a Permit

The California Constitution vests in the county the authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) As part of that power, the county may, "by ordinance, declare what it deems to constitute a public nuisance." (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1086; *id.* at pp. 1095-1096 [affirming summary judgment in favor of city to declare a medical marijuana dispensary a public nuisance because the dispensary was not a permitted use under the city's zoning provisions].)

As we already discussed, the Monterey County Code provisions for each coastal zoning district "list the uses which are allowed or may be allowed subject to discretionary

permit processes," and the code provides that any "[o]ther uses are prohibited." Title 20.14 lists the uses allowed in the Low Density Residential zone. Apart from a very limited number of uses that need no permit (including the "maintenance, alteration, or addition to existing single-family dwellings"), all allowable uses require some form of permit: either a coastal administrative permit (for principal uses listed in section 20.14.040) or a coastal development permit (for conditional uses listed in section 20.14.050).

2. The Penalty was Proper Because Plaintiffs Did Not Have a Permit

It is undisputed plaintiffs never applied for a permit for the short-term rental or wedding uses of their property. And plaintiffs do not argue that their short-term rental or wedding uses fell within one of the use categories that was exempt entirely from any permit requirement. Any argument to that effect would be unpersuasive because renting out a house for short-term rentals or allowing a house to be rented for use as a wedding venue simply does not constitute "maintenance, alteration, or addition to existing single-family dwellings." Plaintiffs argue there was no permit process available. To the contrary, the county made clear in the draft stipulated agreement (sent three months before the administrative hearing) that plaintiffs could apply for coastal development permits for their short-term rental and wedding uses. Despite that offer, plaintiffs elected not to sign the agreement and persisted in refusing to apply for a permit. As plaintiffs' uses were not exempt from a permit requirement and plaintiffs did not have a permit, their use of the property without a permit was a public nuisance that the county had the right to abate through the administrative process at issue here.

C. No Equal Protection Violation

Plaintiffs argue the county engages in disparate treatment between inland landowners and coastal landowners because inland landowners can apply for an administrative permit to operate a short-term rental whereas there is no explicit permit available to coastal landowners. Plaintiffs appear to argue that this disparate treatment

violates the equal protection clauses of the state and federal Constitutions. Plaintiffs risked forfeiting the issue by not citing any equal protection authorities in their opening brief. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1318 ["Points . . . that are not supported by reasoned argument and citations to authority may be deemed forfeited."].)

The equal protection clauses of the state and federal Constitutions seek to ensure that similarly situated groups receive equal treatment. (Cal. Const., art. I, § 7, subd. (a); U.S. Const., 14th Amend.) " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Plaintiffs' equal protection argument is fatally flawed because they failed to apply for a permit. Plaintiffs received the same treatment that similarly situated inland landowners would have received who had not applied for a permit. Thus plaintiffs are similarly situated with inland landowners who operate short-term rentals *without a permit*. Just as in the coastal zone, operating a short-term rental in inland areas without a permit is not allowed. As such, an inland landowner would be subject to a functionally identical administrative fine as the one imposed against plaintiffs. Because plaintiffs were not treated differently than similarly situated inland landowners, there was no equal protection violation.

D. Plaintiffs' Challenge to the Alleged Short-term Rental Ban is Unripe

The majority of plaintiffs' appellate arguments are variations on the same theme: that the county has banned short-term rentals in the coastal zone and that the ban is illegal under the Coastal Act (Pub. Res. Code, § 30000 et seq.) and other laws. Those arguments flow from a faulty premise: plaintiffs treat statements by county staff as an official position taken by the county's decisionmaking body. But county staff members are not the county's decisionmaking body. Decisionmaking authority is vested in the county Board of Supervisors.

Had plaintiffs applied for and been denied a permit, appealed that denial to the Board of Supervisors, and received an adverse decision by the Board, plaintiffs could have challenged that ban in court. Alternatively, under the county code plaintiffs could have requested a formal interpretation of the code and challenged that interpretation had the Board of Supervisors concluded that plaintiffs' uses were banned per se in the coastal zone. Plaintiffs failed to avail themselves of either administrative remedy, meaning there is no final administrative decision by the Board of Supervisors in the record for us to review.

We acknowledge that county staff—including even the planning director—made repeated statements throughout the years suggesting that short-term rentals are not allowed at all in the coastal zone.[2] But because those statements are not a final administrative decision by the county and plaintiffs never obtained one, their arguments about the county's alleged ban are unripe. (See *Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 158 (*Tejon*) [finding complaint challenging preliminary estimates by city staff about the cost of water infrastructure improvements that might be required as conditions of approval for a development project was unripe because the landowner "did not receive a final determination from the City and cannot say with certainty what charges will be imposed or conditions enforced once the City has rendered its final decision based on specific plans for construction"].) That lack of ripeness distinguishes this case from *Greenfield v. Mandalay Shores Community Assn.*

[2] Plaintiffs request judicial notice of an e-mail they received from an associate planner at the county almost a year after the hearing officer's decision and over two months after the trial court lodged its statement of decision. They argue a statement from the associate planner in the e-mail is "a public statement of [the county's] position on short term rentals." As the e-mail was not considered by the hearing officer or the trial court, we deny the request as irrelevant. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 422, fn. 2 ["There is . . . a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be relevant to a material issue."].)

(2018) 21 Cal.App.5th 896, 899-902, where the appellate court ordered the trial court to grant a preliminary injunction regarding a homeowners association's decision to ban all short-term rentals without first obtaining a coastal development permit.

Plaintiffs' remaining arguments are unpersuasive. Plaintiffs argue that the "Coastal Commission has been clear throughout: 'if the activity involves rental of a single-family home in its entirety, no coastal permit is required.' " That argument suffers from the same faulty premise as plaintiffs' argument about the county's regulation of short-term rentals. The quotation is from a 1983 letter by the Coastal Commission's executive director, not from a decision of the Coastal Commission itself. The letter was sent to an attorney representing a client in a different county. And plaintiffs' selective quotation omits the part of the letter where the executive director states his opinion that in some cases (e.g., "where five or more rooms in a home are steadily rented to transients"), "it is clear" that a coastal development permit *would* be required for a short-term rental. There is no formal determination in the record from the Coastal Commission itself regarding whether coastal development permits are required for short-term rentals. Further, a more recent Coastal Commission staff letter in the record that is specifically addressed to the county recognized that the competing priorities of the Coastal Act require a "nuanced approach" to the regulation of short-term rentals.

Plaintiffs' argument about statements by Coastal Commission staff also overlooks the fact that the compliance order plaintiffs challenge here involved not only their use of the property for short-term rentals but also the unpermitted use of the property as a wedding venue, which is not a land use category addressed in any of the Coastal Commission staff documents in the record. Allowing a single family home to be rented for use as a wedding venue is almost certainly a change in the intensity of the property's use for which a coastal development permit would be required. (Pub. Res. Code, §§ 30600, subd. (a) ["any person . . . wishing to perform or undertake any development in

the coastal zone . . . shall obtain a coastal development permit."]; 30106 [" 'Development' means . . . [any] change in the density or intensity of use of land"].)

Plaintiffs argue the trial court exceeded its jurisdiction by describing the types of permit plaintiffs might apply for to legalize their unpermitted use (i.e., the assemblages or other residential uses categories of coastal development permits). But the trial court was merely providing guidance regarding possible avenues to compliance. And the guidance was nonbinding dictum because the trial court's conclusion—which we have concluded is legally correct—was as follows: "Once it is determined that transient rental here without a permit was proscribed, there is clearly evidence that there was a violation by [plaintiffs], and that evidence is substantial, supporting the Hearing Officer's decision."

Plaintiffs contend that even if a coastal development permit was available to them, "coastal owners still suffer unfairly" compared to inland landowners because the administrative permit process available for inland landowners is cheaper than a coastal development permit and does not require a public hearing. As plaintiffs never applied for a permit of any kind, their challenge to the allegedly differential treatment is unripe and we decline to render an advisory opinion, particularly when the arguments relate to policy issues that are better addressed to the county's Board of Supervisors in the first instance. (*People v. Chadd* (1981) 28 Cal.3d 739, 746 ["We will not . . . adjudicate hypothetical claims or render purely advisory opinions."]; see also *Tejon*, *supra*, 223 Cal.App.4th at p. 158 [reasoning when affirming judgment dismissing a procedurally similar action as unripe that it "would be premature for a court to step in at this point before the City has had an opportunity to interpret its own rules and building requirements"].)

Plaintiffs claim "that an automatic denial of any short term rental permit is built into the [county's] Coastal Development Permit process" because coastal development permits must be on a form prescribed by the planning director and there was no form specific to short-term rentals. Again, this argument is unripe because plaintiffs never applied for a permit. And plaintiffs provide no explanation as to why they could not have

applied for a permit using the generic coastal development permit form presumably made available by the county.

In their statement of facts and statement of the case, plaintiffs attempt to delegitimize the administrative process by arguing that the complaints the county received about plaintiffs' unpermitted short-term rental and wedding uses came from "an inland property owner in Carmel Valley who wanted to eliminate the availability of the coastal accommodations." They contend that at the trial court's de novo hearing it was "undisputed that the only complaint about the short-term rental at issue was made by an inland property owner who sought to prevent public access to the coastal property for his own economic reasons." But plaintiffs' support for that argument is not testimony at the hearing but rather an argument by plaintiffs' counsel relating hearsay statements from "witnesses present in court prepared to confirm that the complaint against [plaintiffs] came from" an inland landowner. An attorney's arguments are not evidence. (*Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 843 ["It is elementary statements of the attorneys are not evidence."].) In any event, the identity of the complainant is irrelevant to whether a violation occurred and does not affect our conclusion that the fine at issue was properly imposed.

Nothing in this opinion should be interpreted as precluding plaintiffs from following the proper administrative channels in the future to legalize the short-term rental and wedding uses of their property. The county code provides two avenues: plaintiffs can apply for a coastal development permit, or they can request a formal administrative interpretation of whether short-term rentals are allowed on their property. If plaintiffs choose one of those avenues and receive an unsatisfactory final agency decision after exhausting all administrative remedies, they may then file a new action challenging that final agency decision in the superior court. This opinion merely confirms the straightforward principle that when a land use law requires a permit to use property in a

certain manner, a local governmental body may properly impose a penalty against a landowner who does not obtain (or even apply for) the required permit.

III. DISPOSITION

The judgment is affirmed. Each party to bear its own costs on appeal.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.

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